SUPREME COURT, U.S.
FILED

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In The
Supreme Court of the United States

LFP PUBLISHING GROUP, LLC,
d/b/a Hustler Magazine,
Petitioner,

v.

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the Estate of Nancy E. Benoit,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in refusing to hold as a matter of law that the Freedom of the Press Clause of the First Amendment insulates Petitioner publisher from liability on Respondent Estate Administrator's claim alleging that non-obscene nude photographs of her public figure Decedent, in an article in Petitioner's national magazine on Decedent's life and death, violated the Georgia common law posthumous right of publicity, where Decedent's murder was a national news story of great public interest.

2. Is publication of nude, non-obscene photographs of a murdered public figure as part of a national magazine article on her life and death to be deemed "newsworthy" and insulated from liability by the First Amendment right of freedom of the press, where Decedent's murder by her public figure husband was a national news story?

DISCLOSURE OF PARTIES (RULE 14.1(b))

The parties to the proceedings are: Petitioner (and Defendant) LFP Publishing Group, LLC; Respondent (and Plaintiff) Maureen Toffoloni; and Defendant Mark Samansky, who has not appeared in the action.

DISCLOSURE OF PARENT COMPANIES (RULE 29.6)

Petitioner LFP Publishing Group, LLC is wholly-owned by LE Publishing Advisors, LLC, which is in turn 90% owned by L.F.P., Inc., which has no corporate parent. All such entities are privately owned.

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OPINIONS AND ORDERS BELOW

On October 6, 2008, the United States District Court for the Northern District of Georgia, Hon. Thomas W. Thrash, Jr., entered an Order with opinion granting Petitioner's motion to dismiss the removed Complaint of Respondent Maureen Toffoloni, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim for relief on Respondent's single substantive claim that Petitioner allegedly violated her Decedent daughter's Georgia common law posthumous right of publicity; on October 7, 2008, the Court Clerk entered Judgment dismissing the action. The Order and Judgment are reprinted herein at Appendix 24a, 35a.

On June 25, 2009, the United States Court of Appeals for the Eleventh Circuit entered a decision reversing the district court's dismissal of the action and remanding the case for further proceedings, in an opinion reported as Toffoloni v. LFP Publishing Group, LLC, et al., 572 F.3d 1201. The opinion is reprinted herein at Appendix 1a.

On August 27, 2009, the United States Court of Appeals for the Eleventh Circuit entered an Order denying Petitioner's motion for Rehearing and Rehearing En Banc of its opinion reversing the district court's dismissal of this action; said Order is reprinted herein at Appendix 33a.

JURISDICTION OF THIS COURT

The Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's motion for rehearing and rehearing en banc of its earlier order reversing the order of the district court for the Northern District of Georgia dismissing Respondent's complaint, was entered on August 27, 2009. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254 and Rule 13 of the Rules of the Supreme Court.

Jurisdiction in the federal court of original instance was based on the removal provisions of 28 U.S.C. § 1441(a), due to diversity of citizenship.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case presents an important issue of national significance - whether pursuant to the right of the freedom of the press as set forth in the First Amendment to the United States Constitution, Petitioner's publication of non-obscene nude photographs of a public figure Decedent in its national magazine in a two-page article on her life and death, is immunized from liability for an alleged violation of the Georgia common law posthumous right of publicity, where Decedent's death was a national news story. The case also raises the issue of whether the determination of "newsworthiness" of otherwise lawful nude photographs of a murdered public figure is to be made by the publisher, or by the courts. The opinion of the Eleventh Circuit refusing to recognize Petitioner's First Amendment rights flies in the face of prior rulings of this Court and other Circuits. particularly insofar as the court of appeals' decision is premised on the faulty notion that the First Amendment right to publish need be weighed against community morals.

A. Proceedings Below

This is a lawsuit brought by Respondent Maureen Toffoloni (hereinafter "Respondent") as Administrator of the Estate of her late daughter, Nancy Benoit (hereinafter "Decedent" or "Benoit") against Petitioner LFP Publishing Group, LLC (hereinafter "Petitioner" or "LFP"), the publisher of the internationally known adult-themed gentlemen's publication, *Hustler* magazine. The action concerns Petitioner's publication of a two-page news article on

the life and death of Decedent Benoit, published in the March, 2008 issue of *Hustler*, including fully and partially nude, posed photographs of Ms. Benoit extracted from a videotape previously made by Defendant Mark Samansky ("Samansky")[1] who is not a party to this Petition.

Respondent commenced this action in the Fayette County, Georgia Superior Court seeking a temporary restraining order to prevent publication of the subject photographs of Benoit in *Hustler* magazine, and asserting a single substantive cause of action against LFP for damages for its alleged violation of the Georgia common law posthumous right of publicity. Petitioner removed the case to the district court for the Northern District of Georgia based on diversity of citizenship, 28 U.S.C. § 1441(a).[2] The district court denied Respondent's motions for a temporary restraining order and for a preliminary injunction against publication, and she served her Complaint (Appendix D hereto).

Petitioner LFP moved in the district court to dismiss the action for failure to state a claim for relief pursuant to Rule 12(b)(6) of the Federal Rules

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[1] Defendant Samansky previously filed for bankruptcy in the District of Colorado where he presumably resided, has not appeared in this action, and is not a party to the instant Petition. Samansky is not represented by counsel for Petitioner LFP.

[2] Respondent alleges she is a resident of the State of Florida and that Decedent was a resident of the State of Georgia; Petitioner is a Delaware limited liability company with its principal offices located in California; the amount in controversy exceeds $75,000, exclusive of interest.

of Civil Procedure. The lower court granted the dismissal motion on the grounds that the story of Decedent's life and death, and the accompanying nude photographs of Decedent, were newsworthy and outside the ambit of the Georgia right of publicity. The district court found it was undisputed by Respondent that "Ms. Benoit's death was a 'legitimate matter of public interest and concern,'" and accordingly "publication of Ms. Benoit's nude photographs cannot be described as a mere commercial benefit for [LFP]" (28a) – which would be a prerequisite for a right of publicity claim. Thus, LFP's publication of the subject photographs was protected by "the freedom of press exception to the right of publicity" as a matter of law (29a).

Respondent appealed, and an Eleventh Circuit panel reversed and reinstated the Complaint, in an opinion published at 572 F.3d 1201. That court held that the photographs of Benoit taken more than 20 years before their publication "were neither related in time nor concept" to the story of admitted public interest, and therefore proclaimed that "these photographs do not qualify for the newsworthy exception to the right of publicity" (572 F.3d at 1213). Central to the court's analysis was its opinion that right of privacy protected by the Due Process Clause of the Fourteenth Amendment is as established and fundamental as the right of freedom of speech and of the press explicitly set forth in the First Amendment. Consequently, since the right of privacy impliedly guaranteed by the Due Process Clause exists on the same constitutional plane as the explicit rights stated in the First Amendment, the court reasoned that Petitioner's constitutional right

to publish must be balanced against "that which resonates with our community morals." (572 F.3d at 1208). The court did not discuss the First Amendment implications or the chilling effect of its opinion, but remanded to the trial court for further proceedings (23a). LFP then petitioned the Eleventh Circuit for a rehearing or rehearing of its decision en banc, which petition was denied in an Order of August 27, 2009 (33a).

LFP now petitions this Court to grant a writ of certiorari as to the Eleventh Circuit panel decision reversing dismissal of the instant Complaint, on grounds of Petitioner's First Amendment right of freedom of the press.

B. Factual Background

On Petitioner's motion to dismiss for failure to state a claim for relief, the facts are taken from the Respondent's Complaint, filed in the Georgia Superior Court (37a), and the opinions already issued herein (24a-30a; 1a-23a).[3]

Respondent Toffoloni is the mother and Administrator of the Estate of the late Nancy Benoit. In June, 2007 (A-38, ¶15), Benoit and her son were apparently murdered by their respective husband and father Christopher Benoit, a well-known professional wrestler, who then committed suicide

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[3] Under the familiar federal standard, on a motion to dismiss the courts must take all factual allegation of the complaint as true, but need not accept as true "a legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009).

(41a, ¶15; 2a). At the time of her murder, Benoit was herself a model and professional woman wrestler, and a well-known public figure in her own right (41a, ¶15).

Some 20 years prior to her death, Benoit had voluntarily posed fully and partially nude for photographs and a videotape, taken by named Defendant Mark Samansky, a professional photographer, in the presence of her then- husband (38a, ¶3; 40a, ¶9; 50a, ¶5). After the photographs and videotape were taken, Benoit allegedly changed her mind about having the pictures published, and instead requested Samansky to destroy them. While allegedly agreeing to do so, Samansky apparently destroyed the photographs but kept the videotape (40a-41a, ¶¶12,13; 41a, ¶16). After the Benoit murder-suicide became national and international news (2a), Samansky retrieved the videotape, extracted photographs therefrom (including the nude photographs of Benoit taken as a young woman), and conveyed the right to publish his copyrighted images to Petitioner LFP for publication in *Hustler* Magazine (41a-42a, ¶¶16,17).

When Respondent discovered the forthcoming publication of the nude photos of Benoit in *Hustler*, she demanded that publication cease (42a, ¶18), but Petitioner refused her request based on its rights to publish newsworthy material under Georgia law and the First Amendment, as advised by its counsel (55a-59a); moreover, publication had already occurred. Respondent then brought suit in Georgia state court, seeking a temporary restraining order against the publication, and Petitioner removed the action to

federal court by reason of diversity of citizenship. By the time district court hearings were held in February 2008 on Respondent's motions for a temporary restraining order and later a preliminary injunction, the subject nude photographs of Decedent Benoit had already been published in the March 2008 issue of *Hustler*,[4] rendering the motions moot; the motions for injunctive relief were then denied by the district court (25a).

Respondent asserted a single substantive cause of action for monetary damages, based on LFP's alleged violation of Decedent Nancy Benoit's right of publicity under Georgia common law (45a, ¶30). Petitioner LFP moved to dismiss pursuant to Rule 12(b)(6), which motion was granted by the court, Hon. Thomas W. Thrush, and Respondent appealed (3a). The dismissal was reversed by the Eleventh Circuit panel on June 25, 2009, reported at 572 F.3d 1201, and remanded to the district court for further proceedings (23a). A petition for rehearing and rehearing en banc was denied on September 25, 2009 (33a).

The nude pictures of Benoit had been voluntarily posed in the presence of her then-husband (50a, ¶5), were not obscene, and were published as part of a full two-page news article on her life and death in the March 2008 issue of *Hustler* Magazine. Benoit was admittedly a public figure prior to her death, and her murder was concededly a media story of great public interest. Petitioner LFP

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[4] *Hustler* magazine is published 13 times a year (12 monthly issues plus an extra Holiday issue); thus a new issue come out every four weeks.

asserts that as part of a news story of legitimate public concern, the article did not violate the Georgia right of publicity. However, even if the photographs are assumed to violate Georgia law for purposes of this Petition, a finding of liability in this action would be in violation of LFP's right of freedom of the press pursuant to the First Amendment to the United States Constitution, and result in a chilling effect on publishers in general, not just adult-themed magazines such as *Hustler*. Moreover, the decision of whether or not to publish otherwise lawful, non-obscene photographs of a deceased public figure illustrating a story of public interest should be made by the editors of *Hustler* Magazine and other publishers, and not by the courts, as has been stated by this and other courts in various opinions.

REASONS FOR GRANTING THE PETITION

I. CONTRARY TO THE ELEVENTH CIRCUIT OPINION, THE FIRST AMENDMENT RIGHT OF FREEDOM OF THE PRESS PROSCRIBES RESPONDENT ESTATE ADMINISTRATOR'S CLAIM FOR VIOLATION OF THE GEORGIA RIGHT OF PULICITY AS TO NUDE PHOTOGRAPHS OF HER DECEDENT.

A. The Benoit Nude Photographs are Protected by the First Amendment.

It is long settled law that the First Amendment to the United States Constitution, stating as relevant: "Congress shall make no law . . .

abridging the freedom of speech or of the press . . . ." applies to the states as well as to the federal government by virtue of the Fourteenth Amendment. See, e.g., Virginia v. Black, 538 U.S. 343, 358 (2003). It is also established that even indecent, non-obscene sexual expression is protected by the First Amendment. Reno v. American Civil Liberties Union, 521 U.S. 844, 874-75 (1997); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989). The protection of the First Amendment has been specifically applied to nudity. See, Jenkins v. Georgia, 418 U.S. 153 (1974). Thus, the nude photographs of Decedent Benoit, which are not obscene, constitute expression protected by the First Amendment with regard to Respondent's instant claim.

Here, Respondent Toffoloni asserts a single substantive cause of action for violation of Decedent Nancy Benoit's right of publicity (45a, ¶ 30), first recognized as a posthumous common law right in Georgia in Martin Luther King, Jr. Center v. American Heritage Products, Inc., 250 Ga. 135 (1982). It may be noted that Respondent does not and can not assert a substantive claim for an alleged violation of the Georgia right of privacy, since such a cause of action expires with the death of the person whose right of privacy has purportedly been violated. See 2 J. Thomas McCarthy, The Rights of Publicity and Privacy, § 9:1, pp. 394-95 (2d ed. 2009) [Privacy rights protect human dignitary values measured by mental and physical suffering and reputational damages; "Such classic 'privacy' rights die with the person whose privacy was allegedly invaded."].

Accord, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 210 (1905).

B. The Georgia Right of Publicity has an Exemption for Newsworthy Matters.

Even aside from the First Amendment, the Georgia common law right of publicity carries its own newsworthiness exemption from liability. Thus, in the leading Martin Luther King case, supra, the Georgia Supreme Court found liability for defendant's commercial sale of busts of Dr. King over the plaintiff's objections. In first enunciating its authorization of posthumous publicity rights, the Georgia court expressly limited that right of publicity to those circumstances in which use of the claimant's name or photograph "is not authorized as an exercise of freedom of the press." 250 Ga. at 143. Thus, even aside from First Amendment rights, Georgia case law itself expressly limits the state's right of publicity claim to actions that do not violate the freedom of the press.

Here, the district court held that this limitation would necessarily be fatal to Toffoloni's claim; otherwise, "no newspaper might identify any person or any incident of his life without accounting to him for violation of his 'right of publicity'." (29a), citing the Martin Luther King decision, 250 Ga. at 151-52.

In its opinion below, the Eleventh Circuit itself recognized that Georgia follows a "newsworthiness" exception to an action asserting

the right of publicity. 572 F.3d at 1208. As the court below stated:

> The Supreme Court of Georgia has held that "where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy." Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344, 348 (1956). (572 F.3d at 1208).

Georgia's newsworthiness exemption was summarized by the Eleventh Circuit: "where a publisher may be precluded by the right of publicity from publishing one's image for purely financial gain, as in an advertisement, where the publication is newsworthy, the right of publicity gives way to freedom of the press." (572 F.3d at 1208).

Thus, the Eleventh Circuit correctly recognized – at least in principle – the "newsworthiness" exception to the Georgia right of publicity. Where that court went terribly wrong, however, was its determination that even though the nude photographs of Benoit were used as part of an article on a deceased public figure whose murder was unquestionably a matter of great public interest – rather than for a purely commercial or advertising use – it nevertheless found that said photographs, "do not qualify for the newsworthiness exception to the right of publicity." (572 F.3d at 1213). Under applicable law and precedent, that determination was erroneous.

II. THE ELEVENTH CIRCUIT'S OPINION IS CONTRARY TO THE PRECEDENTS OF THIS COURT AND OTHER CIRCUITS DECLARING THAT UNDER THE FIRST AMENDMENT RIGHT OF FREEDOM OF THE PRESS, THE "NEWSWORTHINESS" OF NUDE PHOTOGRAPHS OF A MURDERED PUBLIC FIGURE USED TO ILLUSTRATE A MAGAZINE ARTICLE OF PUBLIC INTEREST ON DECEDENT'S LIFE AND DEATH IS TO BE DETERMINED BY THE PUBLISHER, NOT THE COURTS.

A. Under this Court's Opinions "Newsworthiness" is Determined by Publishers.

The crux of this Petition is a seemingly simple question. Given an article of public interest on the life and murder of a public figure, who should decide whether or not the publication of non-obscene, posed nude photographs of her to illustrate the article is "newsworthy"? Such a determination must be made within the limits of the freedom of the press afforded to publishers by the First Amendment to the United States Constitution – the Crown Jewel of the Bill of Rights.

It is long-established in this country that First Amendment guarantees of freedom of speech and of the press are not confined to political expression and comment, but go far beyond that. As stated by Justice Brennan in the seminal opinion in Time, Inc.

v. Hill, 385 U.S. 374 (1967), regarding the widespread publication of personal matters:

> One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. (385 U.S. at 388).

Given this broad language as to what is protected by Constitutional freedom of the press, as stated by Professor McCarthy, it is no wonder that: "Judges are uncomfortable with deciding that some information which is demanded by some people is of 'no concern' to the public." Accordingly, "most judges in fact have adopted a laissez faire attitude and 'simply accept the press's judgment about what is and what is not newsworthy.'" 2 J. Thomas McCarthy, The Rights of Publicity and Privacy, § 8:51, p.181 (2d ed. 2009).

In this case, the Eleventh Circuit panel concluded on its review of the subject article that the nude photographs of Benoit published by Petitioner were not incidental to a newsworthy article; rather, the article was incidental to the photographs. (572 F.3d at 1213). However, such a determination is contrary to the spirit and opinions of this Court and other circuits as to who should decide newsworthiness under the First Amendment.

Thus, in Regan v. Time, Inc., 468 U.S. 641 (1984), this Court recognized that, "A determination concerning the newsworthiness or educational value of a photograph cannot help be based on the content of the photograph and the message it delivers." 468 U.S. at 648. Accordingly, the government's approval of a photograph is often message - dependent, and therefore discriminates based on the content of the message, which cannot be tolerated under the First Amendment. 468 U.S. at 648-49.

Shortly thereafter, the Court, citing the Second Circuit dissent in the opinion below, stated: "As Judge Meskill wisely noted, '[c]ourts should be chary of deciding what is and what is not news.' (Citations omitted)." Harper & Rowe Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 561 (1985).[5] Accord, Lerman v. Flynt Distributing Co., 745 F.2d 123, 139 (2d Cir. 1984) ["[C]ourts are, and should be,

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[5] To the extent *Hustler* magazine may be considered by some a publication not primarily known for presenting "hard" news, it is long-established that "entertainment, as well as news, enjoys First Amendment protection." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977). *Hustler* magazine regularly presents social and political news and commentary within its pages, in addition to entertainment news.

reluctant to define newsworthiness"], cert. denied, 471 U.S. 1054 (1985).

In a somewhat different context involving remedies for defamatory statements against private individuals, this Court earlier wrote generally with regard to reporting on matters of public interest, as herein:

> ...it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Mr. Justice Marshall, "what information is relevant to self-government." We doubt the wisdom of committing this task to the conscience of judges. (Citation omitted).

Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

The foregoing has been largely summarized by Dean Prosser in a well-known law review article, William L. Prosser, "Privacy," 48 California Law Review, 383, 412 (1960)["[t]o a very great extent, the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news"].

B. The Eleventh Circuit Misinterpreted the Constitutional Standard for Newsworthiness.

Notwithstanding the foregoing caveats by this Court as to avoiding judicial interference with a publisher's determinations of what it deems "newsworthy," the Eleventh Circuit has nevertheless leapt into the fray with its own interpretation thereof.

Thus, the court below initially went through concepts of privacy, and the history of Georgia common law with regard to the right of privacy evolving into the right of publicity, from the early decision in Pavesich v. New England Life Ins. Co., 122 Ga. 190 (1905) [seminal case in Georgia right of privacy], through Cabaniss v. Hipsley, 114 Ga. App. 367 (1966) [first Georgia appellate court to recognize a separate right of publicity], through the leading case of Martin Luther King, Jr. Center v. American Heritage Products, Inc., 250 Ga. 135 (1982) [setting parameters for Georgia common law posthumous right of publicity].

In the Martin Luther King case, the Georgia Supreme Court indicated that a right of publicity existed for public and private citizens alike not to have their names and photographs used for the financial gain of the defendant without consent, "where such use is not authorized as an exercise of freedom of the press." 250 Ga. at 143. Thus, the Georgia Supreme Court recognized that the right of publicity was necessarily subordinated to the freedom of the press, and required a showing of

financial gain by the unauthorized user. It is noteworthy that the relevant early Georgia cases such as Pavesich, supra, involved the right of privacy where the plaintiff's photograph was used in a commercial advertisement without permission. Similarly, in the Martin Luther King case, a bust of the late Dr. King was produced and sold by defendant without authorization in a direct profit-making activity without any specific public interest component. That is not the case here, where the photographs of decedent Nancy Benoit were used to illustrate a magazine article of public interest on her life and death, as opposed to being part of an advertisement or the direct sale of a product bearing her name or likeness.

These cases finding liability stand in stark contrast to the Georgia Supreme Court decision in Waters v. Fleetwood, 212 Ga. 161 (1956). There, the court held there was no actionable right of privacy under Georgia law, even for publication of gratuitous, sensational photographs alongside a legitimate news article. Rather, the court denied a mother's claim to recover damages for invasion of privacy under Georgia law arising from a newspaper's publication and sale of photographs of the partially decomposed body of her 14-year-old murder victim daughter, after the body was removed from a river. 212 Ga. at 161-62. In addition to the newspaper article, the court also insulated from liability the defendant newspaper's separate sale of copies of the photographs which had appeared in the newspaper aside from the newspaper story, stating that "the same rule must apply as would apply to the publication of the photographs in the paper." 212

Ga. at 167. Petitioner submits that the photographs of the decomposed body of a young girl (which were not voluntarily posed) are far more egregious than the nude photographs of Decedent and public figure Nancy Benoit as part of an article of general public interest on her life and death.

Nevertheless, assuming *arguendo* that the Eleventh Circuit correctly found the subject nude photographs of Benoit violated the Georgia right of publicity for purposes of this Petition, such a claim would still be an unconstitutional violation of Petitioner LFP's First Amendment right of freedom of the press.

In seemingly seeking to become Editor-in-Chief of *Hustler* magazine, the Eleventh Circuit has arrogated to itself the decision that publication of the subject nude photographs of Nancy Benoit was not newsworthy within the protection of the First Amendment freedom of the press. In its analysis, the court failed to cite any of the leading Supreme Court decisions in this area set forth above, such as Hill, Regan, or Harper & Rowe. Rather, the only opinion of this Court cited below was its decision in Zacchini v. Scripps-Howard Broadcast Co., 433 U.S. 562 (1977), that the right of publicity protects the economic value inherent in the right of publicity. 572 F.3d at 1207. However, that case is entirely distinguishable on its facts, involving the defendant's videotaping and televising the plaintiff's complete "human cannonball" entertainment act without his permission. The Court's 5-4 decision narrowly ruled that a television station's appropriating a performer's entire commercial act

crossed the line and was not insulated from liability by the First Amendment. Here, there is little or no commercial value to the nude images of Benoit, since her mother, Respondent Toffoloni, has only indicated a desire to suppress the nude photographs of her daughter, not to publish them.

Moreover, the Eleventh Circuit opined without reference to legal authority, that the rights of freedom of speech and press guaranteed by the First Amendment and the right of privacy guaranteed by the Due Process Clause are equal fundamental constitutional rights that must be balanced in a particular case by weighing the First Amendment right of publication against the community morals. 572 F.3d at 1207-08. It then stated that the Georgia courts have accordingly adopted the "newsworthiness" exception to the right of publicity, citing Waters v. Fleetwood, supra, 532 F.3d at 1208.

The circuit court substantially misapprehends the law herein. While courts have duly recognized a constitutional right of privacy under certain circumstances, as already demonstrated above, the right of privacy is a personal one that dies with the individual who possesses it. Rather, this case involves the very different right of publicity, which in Georgia survives the death of the publicity right holder (here Nancy Benoit) because it is a state property right – as opposed to a personal right – that may be assigned or devised to others. However, the Georgia right of publicity is merely a creation of the state common law, and therefore cannot be deemed a fundamental constitutional right capable of

counterbalancing and outweighing LFP's express First Amendment right of freedom of the press to publish an article of public interest on the highly publicized murder of a public figure. Thus, there can be no balancing of rights to be applied in this case. Here, the explicit First Amendment right of freedom of the press must prevail over the Decedent's common law posthumous right of publicity, or perhaps some amorphous claim of substantive due process, and state law must yield to the federal Constitution.

The Eleventh Circuit itself, following Georgia law, agreed that even a commercial use in a right of publicity context must give way to the freedom of the press for a newsworthy publication. However, its referenced Georgia cases of Pavesich v. New England Life Ins. Co., 122 Ga. 190 (1905), and Waters v. Fleetwood, 212 Ga. 161 (1956), cited by the court (572 F.3d at 1708), primarily equate a commercial use to an advertisement.[6] Here, it is undisputed that the subject photographs were part of an article on a matter of public interest, and not in an advertisement or a direct commercial sale of any kind.

Again, the Eleventh Circuit, without any attempt to analyze this Court's First Amendment freedom of the press cases disfavoring a judicial determination of newsworthiness, conjured up a "straw man" to knock down, asserting that had LFP published the nude photographs of Benoit by

[6] Martin Luther King, Jr. Center v. American Heritage Products, Inc., 250 Ga. 135 (1982), involved a direct commercial sale of a bust in the image of Dr. King.

themselves without a corresponding article, that publication would unquestionably not qualify for the newsworthiness exception. 572 F.3d at 1209. However, that is just not the case herein – the photographs were part of a full two-page article on Benoit's life and death. Thus, the Eleventh Circuit was left with the task of asserting that the publication of the photographs was merely incidental to its commercial purpose. The court contended that:

> Although LFP argues that the photographs were illustrative of the substantive, biographical article included in *Hustler*, our review of the publication demonstrates that such is not the case. These photographs were not incidental to the article. Rather, the article was incidental to the photographs. (572 F.3d at 1209; emphasis supplied).

Unfortunately, this type of "review" by an appellate court is exactly the type of judicial analysis that this Court warned about avoiding in Harper & Rowe, et al., supra.

In an attempt to justify its conclusion that the publication was primarily commercial, the court notes that the cover of the March 2008 issue of *Hustler* states in capital letters, "Wrestler Chris Benoit's Murdered Wife Nude." However, this proclamation was just one of nine cover statements describing -+material inside the March 2008 issue, along with a large picture of the cover model and a

title in large capital letters of the name of the magazine and other material therein. The reference to the "Murdered Wife" occupies but a small fraction of the cover (which specifies wrestler Chris Benoit and does not mention Nancy Benoit by name at all) and simply cannot convert the entire article and photographs into a "commercial use" sufficient to negate Petitioner's First Amendment rights.

Perhaps the primary rationalization of the Eleventh Circuit is its setting up a false scenario that, under LFP's arguments, any notorious death would result in a carte blanche right to publish all images of that person taken during his or her lifetime, "regardless of whether those images were intentionally kept private, and regardless of whether those images are of any relationship to the incident currently of public concern." (572 F.3d at 1210).

In fact, LFP has not made that argument. Petitioner agrees that actual photographic images of Benoit used principally for advertising purposes or for direct sale to the public would be "commercial speech" that would likely not defeat a right of publicity claim against it. Moreover, Decedent Nancy Benoit was not just any person, but a conceded public figure in her own right prior to her murder. However, like a common law suit for defamation, any claim by her under the right of privacy died with her, leaving only a right of publicity. That right itself applies only to commercial uses, such as advertising or direct sales of a product bearing decedent's likeness, as in the Martin Luther King case.

Here, the subject nude photographs of Decedent are not on the cover of *Hustler* magazine, but on the inside on pp. 40-41, and are part of an article on the life and death of a person very much in the national and international news at the time of the publication of the magazine. For a court to declare that these pictures are not newsworthy and outside of the protection of the First Amendment is simply in contravention of this Court's jurisprudence, as well as the learned opinions of Professors McCarthy and Prosser, supra. Moreover, such a precedent would apply not just to *Hustler* magazine and its publisher Larry Flynt, but to other more "mainstream" books and magazines as well. If allowed to stand, this decision would cast a chilling effect over the entire concept of freedom of the press.

In its rationale attempting to explain why the subject nude photographs of Benoit were not newsworthy, the Eleventh Circuit stated that they were not related to the "incident of public concern," which it found to be limited to Benoit's death. 572 F.3d at 1211. However, that is an erroneous analysis of the newsworthy issue. The editors of *Hustler* magazine found that the life and death of Decedent Benoit was of interest to the magazine's readers. As part of Benoit's life story, she unquestionably posed for nude photographs as a young woman – a true fact about her life. *Hustler* then chose to publish photographs illustrating that portion of Benoit's life, as of interest to its readers. Under the applicable legal principles, those photographs were clearly related to an article of public interest, and were therefore part of the newsworthiness exception to the Georgia right of

publicity; if they were not, they were surely protected by the First Amendment.

The panel opinion extensively relied upon the earlier opinion in Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985). There, defendant publisher (a predecessor of Petitioner) was found liable for damages under plaintiff's false light privacy claim, as well as for commercial appropriation of her rights, by publishing nude pictures of her (originally taken for *Playboy* magazine) without her permission.

The Douglass case is readily distinguishable. There, plaintiff Robyn Douglass was a living, professional model, fully entitled to assert false light and other claims under the right of privacy, wherein she was regularly compensated for her pictures. The nude photographs taken of her were not remotely related to a newsworthy story of national media concern – there was no event of public interest (such as a sensational murder) that thrust her into the national news and made her the subject of substantial public interest. The court therein even noted that the subject nude photographs of Ms. Douglass were uncopyrighted, wheras the nude photographs of Benoit were authorized by Defendant Samansky, the photographer and copyright holder.

In Douglass, the Seventh Circuit's comments with regard to plaintiff's lack of consent for publication of her nude photographs and the First Amendment are of particular relevance:

> To forbid *Hustler* to publish any photographs of people without their consent merely because it is an offensive, though apparently a lawful magazine, would pretty much put *Hustler* out of the news business, would probably violate the First Amendment, and would in any event cross outside the accepted bounds of the right of publicity. (769 F.2d at 1139).

The Eleventh Circuit below made no mention of this aspect of the Douglass case. Moreover, had Benoit still been living while nude photographs of her taken in private were published without her consent, this would be a very different case with regard to her right of privacy, as in Douglass. In any event, to the extent the Eleventh Circuit opinion rests on the alleged desire of Decedent Benoit to keep her nude photographs from being published, that is just an allegation made by Respondent Toffoloni, taken to be true for purposes of Petitioner's dismissal motion and not for any other reason. Surely the desire of a public figure to keep unflattering photographs of her from publication cannot be allowed to limit the freedom of the press to publish such photographs if they are related to a newsworthy event of public interest. Otherwise, celebrities photographed in public in a drunken stupor or without their makeup in a candid photograph could prevent publication thereof simply because such pictures do not present them in the way their publicists would like.

To conclude this aspect, the Eleventh Circuit ultimately found that even though the article on Benoit's life and death may have been of public interest, her nude photos taken at least 20 years earlier had no relationship to the "incident of public concern" of Benoit's murder. 572 F.3d at 1211. Thus, the court attempted to distinguish the Georgia Supreme Court decision in Waters v. Fleetwood, 212 Ga. 161 (1956), involving a newspaper's publication of photographs of a murdered child's partially decomposed body, on the grounds that there the photographs of the body were directly related to the "incident of public interest," namely her murder.

There is no basis for such a distinction; nor does the Eleventh Circuit cite any authority for such a "timeliness" requirement. It is noteworthy that in its well-known decision in Time, Inc. v. Hill, 385 U.S. 374 (1967), this Court rejected such a premise, ruling that a *Life Magazine* article on the opening of a new play based on a real incident was a matter of public interest, though the actual incident was several years old at the time. This Court wrote:

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. (Citation omitted)." (385 U.S. at 388)

Lower federal courts have similarly written that there is no requirement limiting newsworthiness to strictly recent events. See, Time,

Inc. v. Johnston, 448 F.2d 378, 381-82 (4th Cir. 1971) ["No rule of repose exists to inhibit speech relating to the public career of a public figure so long as newsworthiness and public interest attach to events in such public career."]; William O'Neil & Co. v. Validea.com, Inc., 202 F. Supp. 2d 1113, 1117 (C.D. Cal. 2002) ["The 'news' exception is not restricted to current events; the [press] may legitimately inform and entertain the public with the reproduction of past events ... ."] (Interior citations and quotations omitted). Thus, the unsupported assertion by the Eleventh Circuit that the passage of time negates the newsworthiness of the subject photographs of Benoit, lacks foundation, and is contrary to much more persuasive authority.

C. Other Circuits Hold that "Newsworthiness" is to be Broadly Construed Under the First Amendment.

Contrary to the Eleventh Circuit opinion in this case, other circuits have taken a much broader approach with regard to First Amendment protections of freedom of the press concerning publication of matters of public interest. For example, the Fifth Circuit gave a more expansive description of what is newsworthy and protected by the First Amendment in its extensive discussion in Lowe v. Hearst Communications, Inc., 487 F.3d 246 (5th Cir. 2007). There, the court stated in general:

> The test for determining newsworthiness is to be construed broadly, extending beyond "the dissemination of news either in the sense of current events or commentary upon public affairs" to include "information concerning interesting phases of human activity embrac[ing] all issues about which information is appropriate so that individuals may cope with the exigencies of their period." (Citation omitted). (487 F.3d at 250).

In Lowe, the Fifth Circuit further explained its rationale with regard to media determinations of newsworthiness as opposed to courts acting as "super editors." There, the circuit court further explained:

> "[W]e are not prepared to make editorial decisions for the media regarding information directly related to matters of public concern." (Citations omitted). . . . This Circuit has declined to get involved in deciding the newsworthiness of specific details in a newsworthy story where the details were "substantially related" to the story. (Citation omitted) (rejecting a challenge even where the media's use of certain material "reflected the media's insensitivity" and "embarrassed" the subject of the article). (487 F.3d at 251).

Thus, unlike the Eleventh Circuit, the Fifth Circuit has declined to become involved in editorial decisions as to newsworthiness.

A similar analysis was recently undertaken by the Tenth Circuit involving publication of highly sensitive material, in Anderson v. Suiters, 499 F.3d 1228 (10th Cir. 2007). There, an alleged rape victim brought an action against a television news reporter and others concerning the release to the media and the television airing of a videotape depicting her rape. The court noted in its ruling affirming summary judgment dismissing the claim, that state law torts involving media publication must take into account First Amendment restrictions therein, as set forth by this Court. This protects the right of the press to disseminate highly sensitive or embarrassing newsworthy information which can affect private individuals like the plaintiff therein, who had not sought publicity or consented thereto, where a legitimate subject of public interest becomes involved. 499 F.3d at 1235-36. In an extensive passage equally applicable to the instant case, and in sharp conflict with the philosophy of the Eleventh Circuit, the Tenth Circuit wrote:

> ...Anderson argues the videotape was highly personal and intimate in nature. While the sensitive nature of the material might make its disclosure highly offensive to a reasonable person, that does not make the videotape any less newsworthy so long as the material as a whole is substantially relevant to a legitimate matter of public concern.

> (Citation omitted). (noting that "[o]ther courts also appear to give 'public interest' status to news material on an aggregate basis, rather than itemizing what in the news report would qualify and what could remain private." (Citation omitted). (499 F.3d at 1236)

The Tenth Circuit duly noted that the plaintiff might find the public display of her case distressing, but since it would be difficult to say that there was no legitimate public interest therein, there could be no liability in that matter. 499 F.3d at 1237. There, the plaintiff was a living person who could assert a right of privacy.[7]

Anderson is similar to this Court's decision in The Florida Star v. B.J.F., 491 U.S. 524 (1989), reversing an award of damages against a newspaper which published the name of a living plaintiff rape victim in violation of a Florida statute proscribing such publication. The majority held that under the First Amendment, to avoid potential self-censorship, imposing liability for a newspaper's publication of truthful information otherwise lawfully obtained may be justified, if at all, "only when narrowly tailored to a state interest of the highest order" (491 U.S. at 541), not therein found.

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[7] Cf. Montana v. San Jose Mercury News, Inc. (1995) 34 Cal.App.4th 790, 793, dismissing privacy and publicity claims under California law by a famous professional football player as to posters of newspaper pages featuring his photograph and an artist's rendering of him ["no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it."].

Here, the publication of nude, but non-obscene photographs of Nancy Benoit, originally posed by her with the intent to publish same, are part of a newsworthy article on her life and death and should not subject Petitioner, as publisher thereof, to liability under the Georgia right of publicity. To intrude on a decision to publish said photographs by the editors of *Hustler* magazine can only lead to a chilling effect on further publication by publishers of any private and/or embarrassing material of public interest concerning public figures and, indeed, would present a threat to the freedom of the press for the future.

CONCLUSION

Hustler magazine is an admittedly controversial publication not for everyone's taste. However, this Court has not hesitated to defend its First Amendment rights in the past. See, Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) ["'Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action' (citation omitted)"]. Here, the Eleventh Circuit's ruling below would cast a chilling effect on publishers in general if courts are to be allowed to act as "super editors" as to non-obscene photographs of public figures in connection with events of public interest.

For the reasons set forth above, from the opinions of this Court to the conflicting rulings of other circuits, the decision to publish lawful photographs of a public figure as part of a newsworthy article on her life and death should be

in the province of editors, and not of the courts. The First Amendment right of freedom of the press demands no less.

Dated: November 25, 2009

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-16148

D. C. Docket No. 08-00421-CV-TWT-1

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 25, 2009
THOMAS K. KAHN
CLERK

MAUREEN TOFFOLONI,
as Administrator and Personal Representative
of the Estate of Nance E. Benoit,

Plaintiff-Appellant,

versus

LFP PUBLISHING GROUP, LLC,
d.b.a. Hustler Magazine,
MARK SAMANSKY, an individual,
DEFENDANTS X, Y, AND Z,
other distributors and sellers
of Hustler Magazine,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(June 25, 2009)

Before WILSON and ANDERSON, Circuit Judges, and GOLDBERG,* Judge.

WILSON, Circuit Judge:

This case involves the newsworthiness exception to the Georgia state law "right of publicity," which arises out of the constitutional right to privacy. The district court found that LFP Publishing Group, LLC's ("LFP") publication of twenty year old nude photographs of Nancy Benoit fell squarely within the newsworthiness exception. We reverse.

A. Background

Maureen Toffoloni is the mother and the administrator of the estate of Nancy Benoit. Benoit and her son, both Georgia residents, were murdered by her husband, Christopher Benoit, in June 2007. Christopher Benoit then committed suicide. Prior to her death, Benoit was a model and professional woman wrestler. Christopher Benoit was a well-known professional wrestler. Their deaths garnered a great deal of domestic and international media attention.

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* Honorable Richard W. Goldberg, United States Court of International Trade, sitting by designation.

Approximately twenty years before her death, Benoit posed nude for photographer Mark Samansky, who took both photographs and a video of her. Toffoloni alleges that, immediately after the shoot, her daughter asked Samansky to destroy the photographs and video and believed that Samansky had destroyed them. However, Samansky kept the video, from which he extracted nude and partially nude photographic stills of Benoit. Samansky conveyed the photographic stills to LFP, which published them in the March 2008 issue of *Hustler* magazine.

In February 2008, Toffoloni brought suit against LFP in Georgia state court, seeking to enjoin the publication of the photographs and seeking damages for violation of Benoit's right of publicity. LFP removed the case to the United States District Court for the Northern District of Georgia. On October 6, 2008, the district court granted LFP's motion to dismiss for failure to state a claim, concluding that "there is no dispute that Ms. Benoit's death was a 'legitimate matter of public interest and concern.' Therefore the publication of Ms. Benoit's nude photographs cannot be described as a mere commercial benefit for [LFP] - although [LFP] (like nearly all journalistic outlets) no doubt seeks to profit from its publications." *Toffoloni v. LFP Publ'g Grp.*, No. 1:08-CV-421-TWT, 2008 U.S. Dist. LEXIS 82287, at *6 (N.D. Ga. 2008). Toffoloni appealed to the United States Court of Appeals for the Eleventh Circuit.

B. The Right of Publicity Under Georgia Law

Georgia recognizes a right of publicity to protect against "the appropriation of another's name and likeness . . . without consent and for the financial gain of the appropriator . . . whether the person whose name and likeness is used is a private citizen, entertainer, or . . . a public figure who is not a public official." *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982). "The right of publicity may be defined as [an individual's] right to the exclusive use of his or her name and likeness." *Id.* at 700 (citation omitted). Violation of the right of publicity is a state tort. *Id.* at 703. *See also Alonso v. Parfet*, 325 S.E.2d 152, 153 (Ga. 1985) ("The courts in this state have long recognized that one who makes an unsanctioned appropriation of another's name or likeness for his own benefit may be liable to that person in tort.") (citation omitted).

The right of publicity grew out of a long-standing recognition of the right to privacy under Georgia law. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69-81 (Ga. 1905). Rooted in the right to privacy, the right of publicity is also characterized by an economic concern that individuals be allowed to control the use of their image in order to maximize the profit they can receive from its publication. We will first discuss the privacy right underpinnings of the right of publicity and then turn to its economic element.

I. The Right to Privacy Underpinning the Right of Publicity

As the Supreme Court of Georgia has explained, "to each individual member of society there are matters private, and there are matters public so far as the individual is concerned." *Pavesich*, 50 S.E. at 69. "All will admit that the individual who desires to live a life of seclusion can not be compelled, against his consent, to exhibit his person in any public place, unless such exhibition is demanded by the law of the land." *Id.* at 70. Thus, "[t]he right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in [Georgia] by the constitutions of the United States and of the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law." *Id.* at 71.

Furthermore, "[o]ne who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze." *Id.* at 70. "The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law is also embraced within the right of personal liberty." *Id.* Importantly, the Supreme Court of Georgia has specifically held that, except as required by law, "the body of a person can not be put on exhibition at any time or at any place without his consent." *Id.*

Concern about the publication of private photographs of individuals without their consent fueled Samuel Warren's and Justice Louis Brandeis'

famous article, "The Right to Privacy," which was substantially relied upon by the Supreme Court of Georgia in *Pavesich*, when the court first recognized the right to privacy. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890); *Pavesich*, 50 S.E. at 74-75. Warren and Brandeis maintained as follows:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops". . . . [t]he law must afford some remedy for the unauthorized circulation of portraits of private persons. . . .

Warren & Brandeis, 4 HARV. L. REV. at 195. Relying on Warren and Brandeis, the Supreme Court of Georgia sought to protect individuals from exhibition against their will by recognizing the right to privacy.

The tort of invasion of privacy protects the right "to be free from unwarranted publicity, . . . or the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs *with which the public had no legitimate*

concern." *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 100 S.E.2d 881, 882 (Ga. 1957) (emphasis added) (internal quotation marks, citation, and alterations omitted). From this right to be free of the public's illegitimate gaze, Georgia extrapolated a right of publicity– a right to control if, when, and under what circumstances one's image is made public and subject to scrutiny.

Georgia first recognized the right of publicity in *Cabaniss v. Hipsley*, 151 S.E.2d 496 (Ga. Ct. App. 1966). The court held that the plaintiff, who was an exotic dancer, could recover from the Atlanta Playboy Club for its unauthorized use of her photograph in an entertainment magazine advertising the club. The court explained that "[u]nlike intrusion, disclosure, or false light, appropriation does not require the invasion of something secret, secluded or private pertaining to plaintiff, nor does it involve falsity. It consists of the appropriation, for the defendant's benefit, use or advantage, of the plaintiff's name or likeness. . . . The interest protected . . . is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity." *Id.* at 503-4 (internal quotation marks and citations omitted). Since the right of publicity is a "proprietary" right, "the measure of damages is the value of the use of the appropriated publicity." *Martin Luther King*, 296 S.E.2d at 703.

Subsequent to *Cabaniss*, the Georgia courts have expanded the right of publicity to "recognize[] the rights of private citizens, as well as entertainers, not to have their names and photographs used for the financial gain of the user without their consent,

where such use is not authorized as an exercise of freedom of the press." *Id.* (citations omitted). Additionally, the Supreme Court of Georgia held "that the right of publicity survives the death of its owner and is inheritable and devisable." *Id.* at 705.

The Restatement (Second) of Torts, however, tempers the right of publicity, providing that:

> No one has the right to object merely because his name or his appearance is brought before the public, *since neither is in any way a private matter, and both are open to public observation.* It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right to privacy is invaded.

RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (1977) (emphasis added). Thus, the Restatement clarifies that the right of publicity does not attach to that which is "open to public observation." *Id.* Accordingly, the right of publicity must attach to that which is not open to public observation and is appropriated for the commercial benefit of another.[1]

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[1] "It is not the manner in which information has been obtained that determines whether it is public or private. . . . The offense with which we are here involved is not the intrusion by means of which information is obtained; it is the publicizing of that which is private in character. The question, then, is whether the information disclosed was public rather than private – whether it was generally known and, if not, whether the disclosure . . . can be said to have been to the public at large." *Virgil v. Time, Inc.*, 527 F.2d 1122, 1126 (9th Cir. 1975) (citation omitted).

II. Economic Concerns Inherent in the Right of Publicity

The Supreme Court of the United States has underscored the economic concern inherent in recognition of a right of publicity. The Supreme Court considered the right of publicity in a case where a broadcasting company transmitted an entertainer's entire performance without his permission, essentially appropriating the entertainer's potential viewing audience. The Court held:

> [t]he rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.

Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576, 97 S. Ct. 2849, 2857 (1977) (internal quotation marks and citation omitted). Thus, when a media outlet appropriates "some aspect" of an individual "that would have market value and for which he would normally pay," without that individual's permission, the media outlet is subject to damages in a tort suit for violation of the right of publicity. *Id.*

C. The "Newsworthiness" Exception to the Right of Publicity

The right to privacy and corresponding right of publicity are necessarily in tension with the First

Amendment's protection of freedom of speech and of the press. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I. Additionally, the Georgia state constitution provides that "[e]very person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty." GA. CONST. art. I, § I, para. V. As the Supreme Court of Georgia has explained, "[t]he right preserved and guaranteed against invasion by the constitution is therefore the right to utter, to write, and to print one's sentiments, subject only to the limitation that in so doing he shall not be guilty of an abuse of this privilege by invading the legal rights of others." *Pavesich*, 50 S.E. at 73.

Both the rights to freedom of speech and freedom of the press, as guaranteed by the First Amendment, and the right to privacy, as guaranteed by the Due Process Clause, are fundamental constitutional rights. The Constitution directs no hierarchy between them. Thus, courts are required to engage in a fact-sensitive balancing, with an eye toward that which is reasonable and that which resonates with our community morals, in order to protect the Constitution as a whole.

In order to navigate between the competing constitutionally protected rights of privacy and publicity and the rights of freedom of speech and of the press, the Georgia courts have adopted a "newsworthiness" exception to the right of publicity. The Supreme Court of Georgia has held that "where an incident is a matter of public interest, or the subject matter of a public investigation, a

publication in connection therewith can be a violation of no one's legal right of privacy." *Waters v. Fleetwood*, 91 S.E.2d 344, 348 (Ga. 1956).

The Georgia Supreme Court has further distinguished commercial use from newsworthy use, stating that "[t]here is in the publication of one's picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guarantees to a person the right to publish his sentiments on any subject." *Pavesich*, 50 S.E. at 80. Accordingly, where a publisher may be precluded by the right of publicity from publishing one's image for purely financial gain, as in an advertisement, where the publication is newsworthy, the right of publicity gives way to freedom of the press.[2]

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[2] The Supreme Court of California has identified a number of factors to be considered when a court determines whether a particular fact qualifies as newsworthy.

> Among the factors to consider are the depth of the intrusion into the plaintiff's private affairs, the extent to which the plaintiff voluntarily pushed himself into a position of public notoriety . . . and whether the information is a matter of public record. . . . The weighing process continues in light of the circumstances prevailing at the time of publication.

Forsher v. Bugliosi, 608 P.2d 716, 727 (Cal. 1980). We agree that each of these factors is potentially relevant to determining whether the published fact could reasonably be considered newsworthy.

D. Analysis of LFP's Publication of the Nude Photographs

This case requires us to consider the nature and extent of the newsworthiness exception to the right of publicity. "It is in the determination of newsworthiness – in deciding whether published or broadcast material is of legitimate public concern – that courts must struggle most directly to accommodate the conflicting interests of individual privacy and press freedom." *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 479 (Cal. 1998). Toffoloni argues that she should be allowed to sue for damages incident to the publication of nude pictures of her deceased daughter because those photographs were published against her express direction and were violative of her daughter's right of publicity. LFP responds that it published an article on the life, career, and tragic death of Benoit, which "includes comment on the modest beginnings of Ms. Benoit's career, and is accompanied by images of Ms. Benoit from that time." LFP argues that the article and related images are of substantial public interest and are therefore newsworthy.

Our resolution of this case commands an intensive review of both the relationship between the published photographs and the corresponding article, as well as the relationship between the published photographs and the incident of public concern – Benoit's murder. We review the district court's grant of LFP's motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), *de novo*. *Berman v. Blount Parrish & Co.*, 525 F.3d 1057, 1057 (11th Cir. 2008).

I. The Incidental Relationship Between the Article and Photographs

First, it seems clear that had LFP published the nude photographs of Benoit by themselves– i.e., without a corresponding news article– the publication would not qualify within the newsworthiness exception. The fact of Benoit's nudity is not in and of itself newsworthy. "While one who is a public figure or is presently newsworthy may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information." *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952) (citations omitted). The nude photographs "impart[] no information to the reading public." *McCabe v. Vill. Voice, Inc.*, 550 F. Supp. 525, 530 (E.D. Pa. 1982). The photographs, by themselves, serve no "legitimate purpose of disseminating news . . . and needlessly expose[] aspects of the plaintiff's private life to the public." *Id.* (internal quotation marks and citations omitted). Indeed, people are nude every day, and the news media does not typically find the occurrence worth reporting.

Here, however, LFP published the photographs alongside a biographical piece on Benoit's career. The biographical piece, in and of itself, certainly falls within the newsworthiness exception. *See generally Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876 (1988). The question before us is whether a brief biographical piece can

ratchet otherwise protected, personal photographs into the newsworthiness exception.

As the Second Circuit has held, "it is appropriate for a court to consider whether the public interest aspect of the publication is merely incidental to its commercial purpose." *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 87-88 (2d Cir. 1989) (internal quotation marks and citation omitted). Although LFP argues that the photographs were illustrative of the substantive, biographical article included in *Hustler*, our review of the publication demonstrates that such is not the case. These photographs were not incidental to the article. Rather, the article was incidental to the photographs.

The magazine cover advertises "WRESTLER CHRIS BENOIT'S MURDERED WIFE NUDE." The table of contents lists "NANCY BENOIT Exclusive Nude Pics of Wrestler's Doomed Wife." Neither the cover nor the table of contents makes any reference to the accompanying article. The article is entitled "NANCY BENOIT Au Naturel: The long-lost images of wrestler Chris Benoit's doomed wife." The title and page frame, which reads "EXCLUSIVE PICS! EXCLUSIVE PICS!," comprise about one-third of the first page. A second third of the page is devoted to two nude photographs of Benoit. The final third of the page discusses Benoit's murder and her nude photo shoot, twice referencing her brief desire to be a model. The second page of the article is entirely devoted to photographs, displaying eight additional photographs of Benoit. The heart of this article was the publication of nude photographs– not the corresponding biography.

The *Martin Luther King, Jr., Center for Social Change* case is particularly relevant here. In that case, the Supreme Court of Georgia answered several certified questions about the existence and extent of the right of publicity under Georgia law in the context of whether the Martin Luther King, Jr., Center for Social Change, Inc. and Coretta Scott King, as administratrix of Dr. King's estate, possessed a right of publicity in Dr. King's image. *Martin Luther King*, 296 S.E.2d at 699. The plaintiffs argued that their right of publicity was violated when B&S Sales manufactured and sold a plastic bust of Dr. King without their permission. Although the opinion does not deal expressly with the "newsworthiness" exception to the right of publicity, the Supreme Court of Georgia specifically notes that B&S Sales offered a free biographical booklet detailing "the life of Dr. King entitled 'A Tribute to Dr. Martin Luther King, Jr.,'" alongside the bust. *Id.* at 698. The court did not conclude that the booklet rendered Dr. King's image, in and of itself, newsworthy. Rather, the opinion treats the existence of the booklet as irrelevant. The booklet was merely incidental to the bust. Without more, Dr. King's estate's right of publicity in his image could trump freedom of speech and the press.

We are convinced that the Supreme Court of Georgia would find similarly here. LFP's brief biography of Benoit's life, even with its reference to her youthful pursuit of modeling, is merely incidental to its publication of her nude photographs. Therefore, the biographical piece cannot suffice to render the nude photographs newsworthy.

II. Relationship of the Photographs to the Incident of Public Concern

Furthermore, we are convinced that the nude photographs are not connected to the incident of public concern. LFP would have us rule that someone's notorious death constitutes a carte blanche for the publication of any and all images of that person during his or her life, regardless of whether those images were intentionally kept private and regardless of whether those images are of any relation to the incident currently of public concern. We disagree.

The Georgia courts have never held, nor do we believe that they would hold, that if one is the victim of an infamous murder, one's entire life is rendered the legitimate subject of public scrutiny. Such a ruling would eviscerate the Georgia right of publicity, allowing the exception to swallow the rule. Rather, the Georgia courts have consistently indicated that there are timeliness or relatedness boundaries that circumscribe the breadth of public scrutiny to the incident of public interest.

For example, in *Tucker v. News Publishing Company*, 397 S.E.2d 499 (Ga. Ct. App. 1990), the court recognized that "through no fault of his own, [the] appellant [who had been attacked] became the object of public interest." *Id.* at 500 (internal quotation mark omitted). The attack itself "necessarily became a matter of legal investigation and the subject matter of public records." *Id.* Thus, the court concluded "*[d]uring the pendency and continuation of the investigation*, and until such time as the perpetrator[s] of the crime may be

apprehended and brought to justice under the rules of our society, the matter will continue to be one of public interest, and the dissemination of information pertaining thereto would not amount to a violation of [appellant's] right of privacy." *Id.* (internal quotation marks and citation omitted) (emphasis added). The court expressly envisioned outside boundaries to the realm of public scrutiny: "the matter [of] public interest" and the "time [that] the perpetrator[s] of the crime may be apprehended and brought to justice. . . ." *Id.* (internal quotation marks and citation omitted).

Similarly, in *Ramsey v. Georgia Gazette Publishing Company*, 297 S.E.2d 94, 96 (Ga. Ct. App. 1982), the court recognized that the "plaintiff has, albeit unwillingly, become an actor in a public drama." As such, "[d]issemination of information *pertaining to this drama* is no violation of the plaintiff's right of privacy." *Id.* (emphasis added). Correspondingly, we conclude that the Georgia courts would find that dissemination of information that does not pertain to the "drama" at hand *may* violate an individual's right of privacy. Although the Georgia courts have not said that public scrutiny is circumscribed solely to the details of the newsworthy event itself, the Georgia courts have required reasonable timeliness and relatedness boundaries.

When determining where such boundaries should be drawn, we are guided by the commentary on the permissible publicity of private facts in the Restatement (Second) of Torts. The Restatement recognizes that, although an individual may be rendered subject to public scrutiny by some newsworthy event, "[t]he extent of the authority to

make public private facts is not . . . unlimited." RESTATEMENT (SECOND) OF TORTS § 652D cmt. h. The Restatement concludes that even public figures, like actresses, may be "entitled" to keep private "some intimate details . . . such as sexual relations. . . ." *Id.* "The line is to be drawn when the publicity ceases to be the giving of information to which the public is *entitled*, and becomes a morbid and sensational prying into private lives for its own sake, *with which a reasonable member of the public, with decent standards, would say that he had no concern.*" *Id.* (emphasis added). The Restatement expounds that "[t]he limitations . . . are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure." *Id.* Furthermore, "*[s]ome reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given.*" *Id.* (emphasis added).

Here, the published nude photographs were in no conceivable way related to the "incident of public concern" or current "drama"– Benoit's death. The district court erred in its reliance upon *Waters v. Fleetwood*, 91 S.E.2d 344 (Ga. 1956), in which the Supreme Court of Georgia "found no actionable right when a defendant featured gratuitous, sensational photographs alongside a legitimate news article" to direct the dismissal of Toffoloni's claim. *Toffoloni*, No. 1:08-CV-421-TWT, at *6. In *Waters*, a newspaper published photographs of a murdered child's deceased body, as illustrative of an article about her murder and the subsequent investigation. Benoit's

situation is distinct from the situation in *Waters*. In *Waters*, the offensive photographs were of the child's deceased body, and as such were directly related to the "incident of public interest" – the child's death. LFP published photographs of Benoit that were at least twenty years old to correspond to a brief discussion about her aspiring career as a model. Those photographs had no relation to her death. Her aspiring nude modeling career at no time developed into an incident of public concern, and for good reason– Benoit sought the destruction of all of those images.

LFP may not make public private, nude images of Benoit that she, allegedly, expressly did not wish made public, simply because she once wished to be a model and was then murdered. "[W]hen a person is involuntarily involved in a newsworthy incident, not all aspects of the person's life, and not everything the person says or does, is thereby rendered newsworthy." *Shulman*, 955 P.2d at 484.

We agree with the Ninth Circuit that "[m]ost persons are connected with some activity, vocational or avocational, as to which the public can be said as a matter of law to have a legitimate interest or curiosity. To hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view." *Virgil*, 527 F.2d at 1131.

Moreover, we are guided by the Tenth Circuit's conclusion that "[b]ecause each member of our society at some time engages in an activity that

fairly could be characterized as a matter of legitimate public concern, to permit that activity to open the door to the exposure of any truthful secret about that person would render meaningless the tort of public disclosure of private facts." *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981). We agree with the Tenth Circuit that the First Amendment "does not require such a result. Therefore, to properly balance freedom of the press against the right of privacy, *every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest.*" *Id.* (emphasis added). *See also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993) ("An individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger.").

The photographs published by LFP neither relate to the incident of public concern conceptually nor correspond with the time period during which Benoit was rendered, against her will, the subject of public scrutiny. The photographs bear no relevance– let alone "substantial relevance"– to the "matter of legitimate public interest." *Gilbert*, 665 F.2d at 208. On these facts, were we to hold otherwise, LFP would be free to publish any nude photographs of almost anyone without their permission, simply because the fact that they were caught nude on camera strikes someone as "newsworthy." Surely that debases the very concept of a right to privacy.

III. Economic Ramifications of LFP's Publication of the Photographs

Finally, we are guided by the Seventh Circuit's opinion in *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), to conclude that LFP may be held liable in damages for violation of the right of publicity when it published images of Benoit that had economic value without her permission– let alone without compensating her estate.

The *Douglass* case has many similarities to this case. Robyn Douglass posed nude for *Playboy* magazine and images from that shoot were published in *Playboy*. Later, *Hustler* ascertained other, previously unpublished photographs of Douglass from the photographer and published them in *Hustler* without Douglass' permission and without compensating her. *Hustler* published these images alongside biographical information about Douglass' acting career. Douglass brought suit seeking compensation for the violation of her right of publicity. Much like in this case, *Hustler* argued that Douglass was newsworthy and that "Robyn Douglass Nude" was fair comment on her career.

The Seventh Circuit disagreed:

> Robyn Douglass or her agents must have control over the dissemination of her nude photographs if their value is to be maximized. *Hustler* can run a story on her and use any photographs that are in the public domain or that it can buy but it cannot use photographs

> made by others for commercial purposes and (temporarily) withheld from public distribution.
>
> The unauthorized publication did impair the commercial exploitation of Douglass'[] talents, though probably not as much as she asserts and mainly because of where they were published. But an important aspect of the 'right of publicity' is being able to control the place as well as time and number of one's public appearances; for example, no celebrity sells his name or likeness for advertising purposes to all comers. In any event, Douglass was not paid by *Hustler* for the right to publish nude photos of her.

Id. at 1138-39 (citation omitted). Likewise, LFP has published photographs of Benoit in *Hustler* without the permission of her estate and without compensation and attempts to justify their publication as comment on her career.

Notably, the primary difference between Douglass' case and Benoit's case is that Benoit does not seem to have ever sought to have nude photographs of herself published. As stated by the Supreme Court of Georgia, "a person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much *if not more than* a person who exploited his image during life." *Martin Luther King*, 296 S.E.2d at 706 (emphasis added).

We agree with the Seventh Circuit that this "unauthorized publication" impaired "the commercial exploitation" of Benoit's image. Certainly, "an important aspect of the 'right of publicity' is being able to control the place as well as time and number of one's public appearances. . . ." *Douglass*, 769 F.2d at 1138. Crude though the concept may seem in this context, Toffoloni is entitled to control when and whether images of her daughter are made public in order to maximize the economic benefit to be derived from her daughter's posthumous fame.

D. Conclusion

These private, nude photographs were not incident to a newsworthy article; rather, the brief biography was incident to the photographs. Additionally, these photographs were neither related in time nor concept to the current incident of public interest. We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity. Accordingly, we reverse and remand for further proceedings.

REVERSED AND REMANDED.

[ENTERED: October 6, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:08-CV-421-TWT

MAUREEN TOFFOLONI
as Administrator and Personal
Representative of the Estate of Nancy
E. Benoit,

Plaintiff,

v.

LFP PUBLISHING GROUP, LLC
doing business as Hustler Magazine, et ai.,

Defendants.

ORDER

This is an action seeking damages and injunctive relief arising out of the publication of nude photographs in Hustler Magazine. It is before the Court on the Defendant's Motion to Dismiss [Doc. 10] which is GRANTED.

1. Introduction

The Plaintiff is the mother of and the administrator of the estate of Nancy Benoit. Ms. Benoit, a Georgia resident, was the victim of a murder-suicide perpetrated by her husband

Christopher Benoit in June 2007. Defendant LFP Publishing Group publishes Hustler Magazine, a self-sty led "Gentlemen's Magazine." (Def.' s Mot. to Dismiss, at 1). The Defendant LFP alleges that it is a "Delaware corporation with its principal place of business located in the State of California." (Notice of Removal ¶ 4). Defendant Mark Samansky, who is not a party to this Motion, is alleged to be a citizen of Colorado.

Christopher Benoit was a well-known professional wrestler. Ms. Benoit achieved her own level of fame as "a model, professional woman wrestler and public figure." (Compl. ¶ 15).

Approximately twenty years ago, Ms. Benoit (then Nancy Daus) posed nude for Defendant Samanksy, a photographer. (Compl. ¶ 9). After Defendant Samansky took photographs and video of the shoot, the Plaintiff alleges that Ms. Benoit requested that Samansky destroy the materials. (Compl. ¶ 13). However, Samansky kept the video and made photographic stills from the video. (Compl. ¶ 16). The Defendant LFP eventually obtained the stills and published them in an article about the Plaintiff - in its March 2008 issue of Hustler Magazine. On February 4, 2008, the Plaintiff filed suit in the Superior Court of Fayette County, Georgia, seeking to enjoin the publication of the nude and semi-nude photographs in Hustler Magazine and seeking damages for violation of publicity. The case was removed to this Court, and this Court denied the Plaintiff's Motion for Temporary Restraining Order on February 8, 2008. The Defendant LFP Publishing now moves to dismiss.

II. Motion to Dismiss Standard

A complaint should be dismissed under Rule 12(b)(6) only where it appears that the facts alleged fail to state a "plausible" claim for relief. Bell Atlantic v. Twombly, 127 S. Ct. 1955, 1965-66 (2007); Fed. R. Civ. P. 12(b)(6). A complaint may survive a motion to dismiss for failure to state a claim, however, even if it is "improbable" that a plaintiff would be able to prove those facts and even if the possibility of recovery is extremely "remote and unlikely." Twombly, 127 S. Ct. at 1965 (citations and quotations omitted). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff. See Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 994-95 (11th Cir. 1983); see also Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994) (noting that at the pleading stage, the plaintiff "receives the benefit of imagination"). Generally, notice pleading is all that is required for a valid complaint. See Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974, 975 (11th Cir. 1985), cert. denied, 474 U.S. 1082 (1986). Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. See Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007) (citing Twombly, 127 S. Ct. at 1964). The Supreme Court has rejected the "no set of facts" standard relied upon by the Plaintiff in opposing the Defendant's Motion to Dismiss. Twombly, 126 S. Ct. at 1969.

III. Discussion

The Defendant argues that there was no violation of publicity because the nude photographs were incident to a legitimate, timely news article concerning a matter of public interest. Georgia recognizes a right of publicity to protect against "the appropriation of another's name and likeness ... without consent and for the financial gain of the appropriator ... whether the person whose name and likeness is used is a private citizen, entertainer, or ... a public figure who is not a public official." Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135, 143 (1982). The right of publicity grew out of a long-standing recognition of the right to privacy - "the Georgia Supreme Court became the first such court to recognize the right of privacy in Pavesich v. New England Life Ins. Co., 122 Ga. 190 (1905)." Martin Luther King, Jr., Center, at 138. An important limitation to the right of publicity is that it does not extend where the use is "authorized as an exercise of freedom of the press." Id.

The Plaintiff submits that the elements for a prima facie case for a violation of the right to publicity are: (1) a use of the owner's likeness or image; (2) used for the appropriator's commercial use or financial gain; and (3) done without the consent of the owner of the right. (Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss, at 8). Both parties agree that the key issue in this case is whether the publication of Ms. Benoit's nude photographs constituted a strictly commercial use.

The Plaintiff argues that the publication of unauthorized photographs can be a violation of a right to publicity. See Cabaniss v. Hipsley, 114 Ga. App. 367 (1966) (Atlanta Playboy Club subject to liability where it ran advertisement featuring unauthorized picture of exotic dancer, thus appropriating image for commercial exploitation). The Plaintiff also argues that the publication is not entitled to first amendment protection because the pictures were not incidental to the story, but rather were the story. "[T]he essence of Hustler's 'business' is publishing salacious, overtly nude and partially nude photographs of women .... [V]irtually the sole purpose of the magazine consists of commercial exploitation of the publication of nude photographs of women." (Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss, at 11).

However, there is no dispute that Ms. Benoit's death was a "legitimate matter of public interest and concern." (Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss, at 10). Therefore the publication of Ms. Benoit's nude photographs cannot be described as a mere commercial benefit for the Defendant - although the Defendant (like nearly all journalistic outlets) no doubt seeks to profit from its publications. The Georgia Supreme Court has previously found no actionable right when a defendant featured gratuitous, sensational photographs alongside a legitimate news article. Waters v. Fleetwood, 212 Ga. 161 (1956). In Waters, the plaintiff alleged a violation of privacy when photographs of her daughter's deceased body were published with a newspaper article concerning her death and subsequent investigation. Id. at 161-62. The court described the photographs as unsettling:

> These photographs were taken at close range, showing the gruesome effects of an atrocious crime, and displaying the dead body of the petitioner's child as an object of public curiosity. The photographs showed the decomposition of parts of the child's body, and showed it wrapped in chains.

Id. In addition to publishing the photographs with the newspaper article, the publisher also advertised and sold copies of the photographs. Id. at 162, 167. The court held that there was no violation of a right to privacy - even as to the reprinted photographs for sale separate from the newspaper article - because the death was a matter of legitimate public interest. Id. This holding provides a guidepost for what is "authorized as an exercise of freedom of the press," the exception carved from the right of publicity in Martin Luther King. "Were it otherwise, no newspaper might identify any person or any incident of his life without accounting to him for violation of his 'right to publicity'." Martin Luther King, Jr., Center, 250 Ga. at 151-52 (Weltner, J. concurring). The freedom of press exception to the right of publicity generally, combined with the Waters court's specific view of what is in the legitimate public interest, precludes a cause of action for violation of publicity rights in this case. The fact that the Court personally views publication of the photographs to be offensive and distasteful is not determinative.

IV. Conclusion

For the reasons set forth above, the Defendant's Motion to Dismiss [Doc. 10] is GRANTED.

SO ORDERED, this 3 day of October, 2008.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

[ENTERED: October 7, 2008]

Hinds, Terry

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Sent: Tuesday, October 07, 2008 8:47 AM

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Subject: Activity in Case 1:08-cv-00421-TWT Toffoloni v. LFP Publishing Group, LLC Terminated Case

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U.S. District Court

Northern District of Georgia

Notice of Electronic Filing

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Case Name: Toffoloni v. LFP Publishing Group, LLC
Case Number: 1:08-cv-421
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WARNING: CASE CLOSED on 10/06/2008
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1:08-cv-421 Notice has been electronically mailed to:

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1:08-cv-421 Notice has been delivered by other means to:

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[ENTERED: August 27, 2009]

IN THE UNITED STATES COURT OF

FOR THE ELEVENTH CIRCUIT

No. 08-16148-GG

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUGUST 27, 2009
THOMAS K. KAHN
CLERK

MAUREEN TOFFOLONI,
as Administrator and Personal Representative
of the Estate of Nance E. Benoit,

Plaintiff-Appellant,

versus

LFP PUBLISHING GROUP, LLC,
d.b.a. Hustler Magazine,
MARK SAMANSKY, an individual,
DEFENDANTS X, Y, AND Z,
other distributors and sellers
of Hustler Magazine,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON and ANDERSON, Circuit Judges, and GOLDBERG*, Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42

* Honorable Richard W. Goldberg, United States Court of International Trade, sitting by designation.

[ENTERED: October 7, 2008]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:08-cv-421-TWT

MAUREEN TOFFOLONI,

Plaintiff,

vs.

LFP PUBLISHING GROUP, LLC, et al.,

Defendant.

JUDGMENT

This action having come before the court, Honorable Thomas W. Thrash, Jr., United States District Judge, for consideration of Defendant's Motion to Dismiss, and the court having granted said motion, it is

Ordered and Adjudged that this action is hereby **dismissed**.

Dated at Atlanta, Georgia, this 7th day of October, 2008.

JAMES N. HATTEN
CLERK OF COURT

By: /s/
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
October 7,2008
James N. Hatten
Clerk of Court

By: /s/
Deputy Clerk

[ENTERED: February 6, 2008]

IN THE SUPERIOR COURT OF FAYETTE COUNTY
STATE OF GEORGIA

Civil Action File No. _____

MAUREEN TOFFOLONI,
as Administrator and Personal
Representative of the ESTATE
OF NANCY E. BENOIT,

Plaintiff

v.

LFP PUBLISHING GROUP, LLC.,
d/b/a Hustler Magazine, MARK
SAMANSKY, an individual, and other
distributors and sellers of Hustler
Magazine, as Defendants X, Y, and Z,

Defendants.

VERIFIED COMPLAINT

COMES NOW Plaintiff Maureen Toffoloni, as Administrator of the Estate of Nancy E. Benoit, and files this Verified Complaint, seeking a Temporary Restraining Order, Permanent Injunction, and Damages against Defendants LFP PUBLISHING GROUP, LLC, d.b.a "Hustler Magazine," MARK SAMANSKY, and the other as yet unknown distributors and sellers of Hustler Magazine, and shows the Court as follows:

PARTIES, JURISDICTION, AND VENUE

(1)

Plaintiff Maureen Toffoloni is a resident of the State of Florida and is the duly appointed administrator and personal representative of the Estate of Nancy E. Benoit, deceased in Fayette County, Georgia. Prior to her untimely death, Nancy Benoit resided in Fayette County, Georgia.

(2)

Defendant LFP Publishing Group, LLC ("Defendant LFP") is a limited liability company organized under the laws of the State of Delaware and is doing business in the State of Georgia and Fayette County. Defendant LFP can be served with the Summons and Complaint in this case by second original. The Defendant LFP has indicated through counsel that it will acknowledge service. Defendant LFP is the publisher of "Hustler Magazine."

(3)

Defendant Mark Samansky is a resident of the State of Colorado. He can be served with the Summons and Complaint in this case by second original at his residence, 10820 Towerbridge Lane, Highlands Ranch, Colorado 80130. Defendant Samansky is the photographer who photographed and videotaped Nancy Benoit, formerly known as "Nancy Daus".

(4)

The unknown Defendants are persons, corporations or other business entities who

distribute or sell Hustler Magazine in Fayette County. The proper names of these Defendants will be added when their names are known to Plaintiff.

(5)

The Defendants are subject to jurisdiction in this Court and venue is proper in this Court pursuant to Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

FACTS

(6)

Plaintiff re-alleges and incorporates by reference all allegations set forth in Paragraphs (1) through (5) as if more fully set forth herein.

(7)

Hustler Magazine is a pornographic magazine, published frequently, upon information and belief, on a monthly basis. The majority of the content of each monthly magazine is graphic and sexual photographs of nude women.

(8)

The Defendants acting as "Hustler Magazine" intend to publish and sell, and have already published and sold in the so-called "March" issue of Hustler Magazine, nude and partially nude photographs of Nancy Benoit. Upon information and belief, Hustler Magazine intends to publish other photographs of Nancy Benoit if it is able to do so. "Exhibit A" to this Complaint, filed herewith under

seal, is a true and correct copy of the article and photographs of Nancy Benoit from the "March" issue of Hustler Magazine.

(9)

The photographs that Hustler Magazine intends to publish were created from a videotape made while Nancy Benoit, then known as Nancy Daus, was posing for photographs approximately 20 years ago.

(10)

Defendant Samansky was the photographer taking the photographs and videotape of Nancy Benoit. Nancy Benoit did not sign a "model's release" or otherwise consent to Mr. Samansky's use of her image for any purpose.

(11)

Nancy Benoit was aware that she was being videotaped by Mr. Samansky, but did not give permission to the photographer to use the videotape in any way. *See* Affidavit of James Daus ¶ 6, attached hereto as "Exhibit B."

(12)

After the photographic session was over, Nancy Benoit immediately decided she did not want to have the photographs published, and she refused to give the photographer permission to do so. *See* Affidavit of James Daus ¶ 7.

(13)

Nancy Benoit and her then husband, James Daus, insisted that the photographer immediately destroy all photographs of her. Defendant Samansky represented to Nancy Benoit and her then husband, James Daus, that all photographs and the videotape had been destroyed by him. Nancy Benoit believed that all photographs and videotape of her had been destroyed within a short time after they were made. *See* Affidavit of James Daus, ¶ 8.

(14)

Nancy Benoit did not want to have nude or partially nude photographs of herself published by Mr. Samansky, or anyone else. *See* Affidavit of Jim Daus, ¶ 9.

(15)

Until Nancy Benoit's untimely death in June 2007, Nancy had a career as a model, professional woman wrestler and public figure. Nancy Benoit exploited her image for commercial purposes. The Estate of Nancy Benoit has the legal right to control use of Nancy's image for commercial and/or financial gain.

(16)

Upon information and belief, Defendant Samanksy lied to Nancy and James Daus and did not destroy the videotape of Nancy Benoit. Defendant Samansky apparently created still photographs from the videotape. Upon information and belief, Defendant Samansky and/or the

Defendant LFP currently have possession of the videotape and photographs.

(17)

Without Nancy's permission, Defendant Samansky sold the photographs and/or still images from the videotape to the Defendant LFP d/b/a Hustler Magazine for publication. Plaintiff does not know the amount of money that changed hands between Hustler Magazine and Mark Samansky.

(18)

On January 16, 2008, Counsel for Plaintiff sent a letter to Hustler Magazine requesting that Hustler refrain from publishing the photographs because publication of the photographs would be a violation of Nancy Benoit's right of publicity. A true and correct copy of that letter is attached hereto as "Exhibit C."

(19)

On January 25, 2008, counsel for Defendant LFP responded to counsel for Plaintiff indicating that Hustler denied Plaintiff's request and intended to publish nude and partially nude photographs in its March issue. Defendant LFP claims, in that letter, that publication of the photographs of Nancy Benoit is authorized as an exercise of freedom of the press "[t]he photographs of Ms. Benoit as a beautiful young woman in her twenties are being used to illustrate a legitimate and serious news article ... about her life." A true and correct copy of that letter is attached hereto as "Exhibit D".

(20)

Defendant LFP's publication of the photographs is not authorized as an exercise of the freedom of the press because publication of nude and partially nude photographs of Nancy Benoit are not necessary or relevant to a "legitimate and serious news article."

(21)

Hustler Magazine has already begun disseminating photographs of Nancy Benoit and advertising the nude images to its customers. Wrestle Zone, an online wrestling enthusiast website, contains a fan posting about the upcoming "March" issue of Hustler Magazine and a link to other photographs of Nancy Benoit. A print out of the Wrestle Zone posting is attached hereto as "Exhibit E".

COUNT 1: **PETITION FOR TEMPORARY RESTRAINING ORDER**

(22)

Plaintiff re-alleges and incorporates by reference all allegations set forth in Paragraphs (1) through (21) as if more fully set forth herein.

(23)

If the photographs of Nancy Benoit are published, Plaintiff will be immediately and irreparably harmed, in that the photographs cannot be unpublished. Once they are published, the public will always be able to see them.

(24)

Among other legal matters, Plaintiff intends to file a wrongful death action in this Court on behalf of the Estate of Nancy Benoit concerning the murders of Nancy Benoit and her minor child Daniel Benoit. If the photographs are published, Plaintiff will be immediately and irreparably harmed because the photographs may be seen by, and unfairly influence, the potential venire for the wrongful death case.

(25)

Monetary damages are inadequate to remedy the harm to Plaintiff.

COUNT 2: PETITION FOR PERMANENT INJUNCTION

(26)

Plaintiff re-alleges and incorporates by reference all allegations set forth in Paragraphs (1) through (25) as if more fully set forth herein.

(27)

Publication of the photographs would constitute a violation of Nancy Benoit's right of publicity, which may be enforced by her estate.

(28)

No adequate remedy at law exists if Hustler Magazine is permitted to publish or continue to publish the photographs of Nancy Benoit.

COUNT 3: CLAIM FOR DAMAGES

(29)

Plaintiff re-alleges and incorporates by reference all allegations set forth in Paragraphs (1) through (28) as if more fully set forth herein.

(30)

In the alternative, the Defendants have already published and sold photographs of Nancy Benoit so as to exploit her image for their own commercial purposes. Defendants are liable to Plaintiff for actual and punitive damages for violation of Nancy Benoit's right of publicity in an amount to be determined by a jury. Defendants are also liable to Plaintiff for attorney fees and expenses of litigation pursuant to O.C.G.A. §13-6-11.

WHEREFORE, Plaintiff respectfully prays as follows:

(a) that the Court timely hear oral argument from Plaintiff on the application for Temporary Restraining Order;

(b) that the Court issue a Temporary Restraining Order preventing Defendant LFP Publishing Group, LLC and Hustler Magazine from publishing photographs of Nancy Benoit;

(c) that the Court issue a Permanent Injunction preventing Defendant LFP Publishing Group, LLC and Hustler

Magazine from publishing photographs of Nancy Benoit; and

(d) that the Court grant Plaintiff such other and further relief as is just and proper, including actual and punitive damages, all costs of this litigation, and attorneys fees pursuant to O.C.G.A. § 13-6-11.

Respectfully submitted this 4th day of February, 2008.

/s/ Richard P. Decker
Richard P. Decker
State Bar of Georgia No. 215600
DECKER, HALLMAN, BARBER & BRIGGS
Attorneys for Plaintiff Maureen Toffoloni

260 Peachtree Street, N.W.
Suite 1700
Atlanta, Georgia 30303
(404) 522-1500

IN THE SUPERIOR COURT OF FAYETTE COUNTY
STATE OF GEORGIA

Civil Action File No. _____

MAUREEN TOFFOLONI,
as Administrator and Personal
Representative of the ESTATE
OF NANCY E. BENOIT,

Plaintiff

v.

LFP PUBLISHING GROUP, LLC.,
d/b/a Hustler Magazine, MARK
SAMANSKY, an individual, and other
distributors and sellers of Hustler
Magazine, as Defendants X, Y, and Z,

Defendants.

VERIFICATION

Personally appeared before me an officer duly authorized by law to administer oaths, MAUREEN TOFFOLONI, as Administrator and Personal Representative of the Estate of Nancy E. Benoit who, after being sworn, deposes and states that she has read the foregoing Complaint, and that the facts and allegations contained therein are true and correct to the best of her knowledge.

/s/ Maureen Toffoloni
MAUREEN TOFFOLONI

Sworn to and subscribed before me
this 31 day of Jan, 2008.

/s/ Toni V. Tamm
Notary Public (Affix Seal and Expiration Date)

Toni V. Tamm
Commission # DD370220
Expires December 5, 2008
Bonded Troy Fain – Insurance, Inc. 800-385-7019

EXHIBIT B

IN THE SUPERIOR COURT OF FAYETTE COUNTY
STATE OF GEORGIA

Civil Action File No. _____

MAUREEN TOFFOLONI,
as Administrator and Personal
Representative of the ESTATE
OF NANCY E. BENOIT,

Plaintiff

v.

LFP PUBLISHING GROUP, LLC.,
d/b/a Hustler Magazine, MARK
SAMANSKY, an individual, and other
distributors and sellers of Hustler
Magazine, as Defendants X, Y, and Z,

Defendants.

AFFIDAVIT OF JAMES DAUS

STATE OF FLORIDA

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, JAMES DAUS, who, after being duly sworn, deposes and states as follows:

(1)

My name is James Daus. I am over the age of 18. I have personal knowledge of the facts stated herein and know them to be true.

(2)

I give this Affidavit in support of Plaintiff's Complaint and Application for a Temporary Restraining Order and Permanent Injunction against Defendant LFP Publishing Group, LLC.

(3)

From 1981 to 1986, I was the husband and business partner of Nancy Benoit who was known at the time as Nancy Daus. I acted as the manager and promoter of her career during that time.

(4)

I am aware that Hustler Magazine has published and/or intends to publish nude and/or partially nude photographs of Nancy Benoit. I understand that these photographs were created from a videotape taken while Nancy Benoit posed for photographs approximately twenty-five years ago for a photographer named Mark Samansky.

(5)

I was present at all times when Nancy Benoit posed for photographs by Mr. Samansky. This took place in Florida in the Summer of 1983.

(6)

Nancy Benoit and I were aware that Mr. Samansky was videotaping her while also taking still photographs, but neither Nancy or I ever gave permission to Mr. Samansky to use the videotape in any way.

(7)

As soon as the photographs were taken, Nancy and I immediately decided she did not want to have the photographs published. Neither Nancy or I gave Mr. Samansky permission to use the photographs or any videotape in any way.

(8)

Nancy Benoit and I insisted that the photographer, Mr. Samansky, immediately destroy all photographs of her. Mr. Samansky told us that all photographs and the videotape had been destroyed. Nancy Benoit and I believed that all photographs and the videotape of her had been destroyed.

(9)

I know of my own knowledge that Nancy Benoit did not want to have nude or partially nude photographs of herself published at any time. I know of my own knowledge that she never gave Mr. Samansky the authority to use any photographs or videotapes of her for any purpose.

FURTHER AFFIANT SAYETH NOT.

/s/ James Daus
JAMES DAUS

Sworn to and subscribed before me
This 31st day of January, 2008.

/s/ Carol Grach
Notary Public

CAROL GRACH
Comm # DD0521696
Expires 2/22/2010
Bonded thru (800) 432-4254
Florida Notary Assn., Inc

EXHIBIT C

DECKER, HALLMAN, BARBER & BRIGGS
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

RICHARD P. DECKER*
e-mail:
rdecker@dhbblaw.com

260 PEACHTREE STREET, N.W.
SUITE 1700
ATLANTA, GEORGIA 30303
(404) 522-1500 MAIN
(404) 577-9149 FACSIMILE

* also admitted in
Virgin Islands

January 16, 2008

Mr. Sean Berries
Custodian of Records
LFP Internet Group, LLC
LFP Video Group, LLC
8484 Wilshire Blvd.
Beverly Hills, CA 90211

Mr. David Carillo
Custodian of Records
LFP Publishing Group, LLC
8484 Wilshire Blvd.
Beverly Hills, CA 90211

Re: Nancy Toffoloni Benoit

Gentlemen:

This firm represents Maureen Toffoloni, the Administrator of the Estate of Nancy Toffoloni Benoit, who died in June of 2007.

It has come to our attention that your website, Hustler magazine, or a related publication or entity

intends to publish nude or partially nude photographs of Nancy Benoit. These photographs were apparently made years ago, under suspicious circumstances, leading us to question the legal propriety of same.

The purpose of this letter is to advise you of our client's strenuous objection to your publication of any photographs depicting the likeness of Nancy Benoit.

The estate of Nancy Benoit, represented by our client Maureen Toffoloni, would have legal title and any copyright to any likeness of Nancy Benoit. Your use of the likeness of Nancy Benoit in any form is expressly prohibited, unauthorized, and denied. *See* Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135 (1982).

Please advise the undersigned within 10 days of this letter that the publications or entities you represent will refrain from the publication of any photographs or likenesses of Nancy Benoit. If we do not hear from you within 10 days, we will assume that you intend to go forward with publication of this material, and will file suit in a Georgia court to prevent it. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

Please be governed accordingly.

Yours very truly,

Richard P. Decker

For DECKER, HALLMAN, BARBER & BRIGGS

RPD:mla

EXHIBIT D

Lipsitz Green Scime Cambria LLP

42 Delaware Avenue, Suite 120,
Buffalo, New York 14202-3924
P 716 849 1333 F 716 855 1580 (Not for service)
www.lglaw.com

January 25, 2008

Via UPS Overnight

Richard P. Decker, Esq.
Decker, Hallman, Barber & Briggs
Attorneys at Law
260 Peachtree Street, N.W.
Suite 1700
Atlanta, GA 30303

Re: Nancy Toffoloni Benoit Photographs

Dear Mr. Decker:

This firm is retained counsel for LFP Publishing Group, LLC ("LFP"), the publisher of *Hustler Magazine*. We have been asked to respond to your letter to LFP dated January 16, 2008 with regard to the publication of nude and partially nude photographs of the late Nancy Benoit. We understand that in this matter, you are representing Maureen Toffoloni and/or the Estate of Nancy Benoit.

In said letter, you protest the publication by *Hustler Magazine* of said photos of Nancy Benoit, and

demand that *Hustler* agree not to publish same. On behalf of LFP and *Hustler*, we must respectfully deny your request.

In your letter, you first indicate that your client would have legal title in any copyright to a likeness of Nancy Benoit. This contention is erroneous. The copyright in the photographs belongs to the photographer/videographer who originally took the pictures as their author pursuant to the United States Copyright Act, 17 U.S.C. § 101 *et seq*. Here, LFP is informed that the subject photographs were images made from a motion picture video, for which Nancy Benoit clearly and voluntarily posed. LFP has obtained the permission of the copyright holder to publish said photographs, and therefore your client has no copyright claim herein.

You further assert that any use of the likeness of Nancy Benoit is "prohibited, unauthorized, and denied," citing Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135 (1982), and that unless *Hustler* agrees not to so publish, you will file suit in a Georgia court, citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

The Supreme Court's Keeton decision concerns personal jurisdiction, statutes of limitations, and related procedural issues, rather than substantive rights. It is accordingly not relevant to this response. The substantive opinion of the Georgia Supreme Court in the King case is relevant, but does not serve to support your client's position.

As you are aware, the recent tragic death of Nancy Benoit, apparently murdered by her husband in their home, made national headlines in the newspapers, and was extensively covered by both network and cable television news shows. Aside from her husband Chris, Nancy herself had been a popular personality in the wrestling world, and was well-known by the national wrestling organizations and wrestling fans throughout the country. She was accordingly a public figure and celebrity, and her gruesome death was unquestionably of great public interest. Accordingly, Georgia, the State of her domicile, would afford her a right of publicity, not to have her name or photograph used "for the financial gain of the user without [her] consent, where such use is not authorized as an exercise of freedom of the press." 250 Ga. at 143.

Here, there is no such violation of Nancy Benoit's right of publicity by publication of her likeness in *Hustler Magazine*. The photographs of Ms. Benoit as a beautiful young woman in her twenties are being used to illustrate a legitimate and serious news article in the Magazine on her life, including her early career, her attempts at modeling, her various marriages, and her attempts to pose for *Penthouse Magazine*. Thus, we are not dealing with a commercial exploitation of Ms. Benoit's image for monetary gain, but as part of a legitimate news story. Such use by *Hustler Magazine* is clearly authorized and protected by the First Amendment to the United States Constitution, as is expressly recognized by the Georgia Supreme Court in its King decision. Such lawful publication of photos of a deceased public figure in a matter of public interest

is sharply contrasted with the clearly unauthorized and unlawful appropriation of the property rights in a decedent's image for commercial exploitation, as was seen in the facts of the King case. Recognizing the First Amendment right of publication by a free press in matters of public interest, as opposed to mere advertisements or commercial use, the Georgia Supreme Court in King itself acknowledged the press' right of free expression in this country.

To the extent that your client may attempt to assert some kind of "privacy" right in the images of Nancy Benoit, privacy rights are designed to protect values of human dignity. However, it is long-established law that such privacy rights end with the death of the person whose privacy was allegedly invaded.

To summarize, your client does not own any copyright interest in the photographs of Nancy Benoit, and the use of her photographs in connection with a legitimate news article of public interest in *Hustler Magazine* does not afford any right of publicity, and would otherwise be precluded by the freedom of the press contained in the First Amendment.

While we certainly sympathize with your client's grief as to the senseless murder of Nancy Benoit, *Hustler Magazine* has every legal right to publish said photographs as part of a legitimate news article on her life and death, as a matter of substantial public interest.

Sincerely,

LIPSITZ GREEN
SCIME CAMBRIA LLP
Attorneys for
Hustler Publishing Group, LLC

By: /s/ Paul J. Cambria, Jr., Esq.
Paul J. Cambria, Jr., Esq.

PJC/WMF/lv

F:/ADULT/11740/0964/08c/Deck0125

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EXHIBIT E

Nancy Benoit XXX Rated Photos To Appear In Hustler Magazine

12/27/2007 by Ryan Clark

LTrott3 sent this one in:

The upcoming issue of Hustler magazine (March 2008) has a two page spread of no photos of the late Nancy Benoit. Apparently these images are from when she was married to Jim Daus. Apparently she was touring doing bikini and wet t-shirt competitions in Florida when one of the hosts told her she should be in Penthouse. He set up a photo shoot for her and then videotaped the photo shoot. Nancy never submitted the photos and later had them destroyed but either never knew about or got the video which is now in the possession of Hustler.

It is the March 08 issue of Hustler magazine with a headline on the cover. I have a subscription so I got my issue in advance, I don't think it is on the newsstands yet as I live in LA and I haven't seen it there yet. Actually if you can get a hold of the Feb 2008 issue, there is an ad for it in the "Coming Next Month" section

http://wrestlezone.com/article.php?articleid=200809385

1/29/08